

**ST 99-35**

**Tax Type: Sales Tax**

**Issue: Audit Methodologies and/or Other Computational Issues  
Books and Records Not Sufficient**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

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**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

v.

**"BOTTLE-O-BEER LIQUOR CO. INC."**

d/b/a "Bluto's Food & Liquor",  
Taxpayer.

Docket No. 98-ST-0000  
IBT No. 0000-0000  
NTL Nos. SF-9700000000000  
SF-97000000000001  
John E. White,  
Administrative Law Judge

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:**

Akram Zanayad, on behalf of for "Bottle-O-Beer Liquor Co., Inc."; Alan Osheff, Special Assistant Attorney General, for the Illinois Department of Revenue.

**Synopsis:**

This matter arose when "Bottle-O-Beer Liquor Co., Inc." ("BOB" or "taxpayer") protested two Notices of Tax Liability ("NTL") issued by the Illinois Department of Revenue ("Department"). NTL number SF-970000000000 assessed Retailers' Occupation Tax ("ROT") regarding the period beginning 7/1/93 through and including 11/30/93, and NTL number SF-970000000001 assessed ROT regarding the period from 12/1/93 through and including 12/31/96.

A hearing was held at the Department's offices in Chicago, in February 1999. The issue in this matter involves alleged errors made when the Department corrected "BOB's" returns filed during the audit period. At hearing, taxpayer introduced evidence consisting of its books and records, workpapers prepared by the Department during its audit of taxpayer, and the testimony of its president. I have reviewed the evidence

adduced at hearing, and I am including in this recommendation findings of fact and conclusions of law. I recommend that the issues be resolved in taxpayer's favor, and that the NTL's be revised to reflect the applicable changes.

**Findings of Fact:**

**Facts Regarding "BOB's" Business:**

1. "BOB" is a corporation that conducts business in Illinois as "Bluto's Food & Liquor". *See* Department Ex. 1.
2. Taxpayer is engaged in the business of making retail sales of tangible personal property, to wit: food and liquor, at 1111 West "Anywhere" Street, "Anyplace", Illinois. Department Ex. Nos. 2, 4 (upper left corner of correction of returns); Hearing Transcript ("Tr.") pp. 76-77 ("Yoyo").
3. "Duncan Yoyo" is the owner and an employee of taxpayer. Tr. pp. 75-76 ("Yoyo").

**Facts Regarding the Department's Audit:**

4. Taxpayer kept and maintained books and records as part of the operation of its business, and taxpayer provided those records for Department inspection and audit. Tr. pp. 28-29 (Hoyt) (on 12/16/96, auditor received taxpayer's returns, bank statements, copies of checks and copies of sales tax returns from taxpayer; on 2/10/97, she received corporate papers, sales tax returns, cancelled checks payable to the Department, "Anyplace" soft drink returns, Illinois withholding returns and checks, a food stamp letter, daily income report, bank statements and cancelled checks, inventory sheets, federal and state income tax returns, purchase invoices, and cash register tapes from December 26, 1996 forward). p. 78 ("Yoyo").

5. Because of the large amount of books and records tendered by taxpayer, the auditor picked calendar year 1995 as a test year, and reviewed the books and records relevant to that year in the audit period. Tr. pp. 29-30 (Hoyt).
6. The auditor made a determination to disregard the amount of taxable gross receipts that taxpayer reported on its monthly ROT returns. Tr. pp. 126-27 (Hoyt); Department Ex. 2, 4 (corrections of taxpayer's returns). The reason why that determination was made was never revealed at hearing (*see* Tr. p. 126 (Hoyt)), and taxpayer did not contest that determination. *See* Tr. p. 133 (closing argument).
7. Instead of accepting the gross receipts as reported on taxpayer's returns, the auditor calculated "BOB's" taxable gross receipts using a formula which multiplied taxpayer's wholesale cost of the goods it purchased for resale by a mark-up percentage. Tr. pp. 126-27 (Hoyt).
8. The auditor prepared a schedule of taxpayer's purchases for resale, using the purchase invoices taxpayer kept and maintained. Taxpayer Ex. 1, p. 1 (titled, "Schedule 7"); Tr. pp. 33-34 (Hoyt). She also requested sales records from vendors who sold goods for resale to taxpayer, and prepared a schedule of purchases using that information. Taxpayer Ex. 1, p. 2 (titled, "Schedule 7A"); Tr. p. 34 (Hoyt).
9. The auditor compared the two purchase schedules and found that the amount of purchases scheduled using vendors' records was greater than the total purchases using taxpayer's records. *See* Taxpayer Ex. 1; Taxpayer Ex. 2 (titled "Schedule 7A-1"). The auditor treated the difference (times a mark-up) as unreported sales, and projected a percentage of such unreported sales throughout the entire audit

- period. Taxpayer Ex. 2; Tr. pp. 30-31, 44, 126-27 (Hoyt).
10. On the auditor's schedule 7A-1, five of the eleven vendors' records showed fewer sales to taxpayer than did taxpayer's records show purchases from the particular vendors. Taxpayer Ex. 2 (entries for "A", "B", "C", "D" and "E").
  11. Of the remaining six vendors listed in schedule 7A-1, four vendors recorded only slightly higher sales to taxpayer than taxpayer's records showed purchases from the same vendor (*see* Taxpayer Ex. 2 (entries for "F", "G", "H" and "I")), and taxpayer did not protest that aspect of the auditor's correction of taxpayer's returns, and related projections. *See* Tr. pp. 133-39 (closing argument).
  12. The auditor found that the records from two vendors, "F & J" and "Bottoms Up Beverage Systems", reflected much higher sales to taxpayer than did the records she reviewed from the invoices taxpayer kept. *See* Taxpayer Ex. 2.

**Facts Regarding "Bottoms Up" Records & Taxpayer's Records:**

13. The record "Bottoms Up" tendered to the Department auditor is a computer printout showing, for each month during 1993 through 1996, the total number of cases of beer "Bottoms Up" records reflected were sold to taxpayer, broken down by brand and type of package. *See* Taxpayer Ex. 3.
14. While the "Bottoms Up" report identifies the type and number of goods the vendor's records purport to show were sold to taxpayer, the report does not identify the actual prices "Bottoms Up" received from taxpayer for the goods taxpayer purchased from it. Taxpayer Ex. 3; Tr. p. 46 (Hoyt).
15. To use the information in the "Bottoms Up" report in her audit, the auditor had to calculate how much money "Bottoms Up" should have received for the goods its

- records showed it sold to taxpayer. Taxpayer Exs. 2-3; Tr. pp. 37-38 (Hoyt).
16. On the "Bottoms Up" report, the auditor wrote the selling prices someone at "Bottoms Up" told her were the prices for each brand and case of beer, and then recorded (after calculating) what the total selling price would be for the number of cases sold for each brand/package. Taxpayer Ex. 3; Tr. pp. 37-38 (Hoyt). The per case prices the auditor used are consistent with the prices listed on the invoices kept and maintained by taxpayer, but only if taxpayer never received any discounts or allowances from "Bottoms Up". *Compare* Taxpayer Ex. 2 with Taxpayer Exs. 3-4.
  17. On most of the invoices it received from "Bottoms Up", taxpayer was given discounts for purchasing various brands/packages of beer. Taxpayer Ex. 4, *passim*. On her schedule 7A-1, the auditor allowed some of the credits attributable to taxpayer's purchases from "Bottoms Up", but did not allow any credits that had been handwritten on the copies of the invoices kept by taxpayer and produced for audit. Tr. pp. 40-43 (Hoyt).
  18. Taxpayer paid for purchases either by cash or by check. *See* Taxpayer Ex. 4, *passim*. When taxpayer paid an invoice by check, "Yoyo" regularly recorded the check number, in original ink or pencil, on taxpayer's copy of the invoice. *Id.*; *see also* Taxpayer Ex. 5, *passim*. On those invoices on which "Yoyo" wrote the check number and the amount of payment, the check amounts agreed with the amount of the discounts handwritten on the invoice. *E.g.* Taxpayer Ex. 4, pp. 4, 15, 38, 91.
  19. After the auditor informed "Yoyo" of the contents of schedule 7A-1, and

- throughout the period following taxpayer's protest, taxpayer contested the accuracy of "Bottoms Up" records, and asserted that it never received, nor paid for, many of the goods "Bottoms Up" records reflect were sold to taxpayer. Tr. pp. 80-81 ("Yoyo"), 122 (Hoyt); *see also* Taxpayer Ex. 9.
20. After the auditor showed "Yoyo" her schedule 7A-1, he contacted "Bottoms Up" to inquire as to the bases for their records of sales to taxpayer. Tr. pp. 80-81, 96-97 ("Yoyo"), 122-23 (Hoyt, describing the type of evidence she wanted to see from "Bottoms Up").
  21. After being contacted by him, "Bottoms Up" provided certain invoices to "Yoyo" (*see* Tr. pp. 68, 72-73 ("Roy Rogers" ("Rogers")), sales manager for "Bottoms Up"), 80, 96-97 ("Yoyo")), three of which "Yoyo" identified at hearing. Taxpayer Ex. 9; Tr. pp. 83-91 ("Yoyo"). "Yoyo" claimed that he never received the goods identified in those three invoices, and that he never made a single \$13,000 purchase from any single vendor. Tr. pp. 83-91 ("Yoyo").
  22. "Bottoms Up" invoices were prepared by the individual truck driver/salesman at each stop on his route. Tr. pp. 62-64 ("Rogers"). Each driver had, in his truck, a printer for printing out the order / invoice from each customer. *Id.*
  23. Almost all of the "Bottoms Up" invoices taxpayer kept and maintained consisted of a yellow sheet from a carbonless formset. *See* Taxpayer Ex. 4. The yellow sheet was not the top page of the formset. *See id.* Only rarely did taxpayer purchase goods from "Bottoms Up" without receiving a discount. Taxpayer Ex. 4, pp. 14, 51, 66, 96 (only 4 of the 103 invoices had no discounts).
  24. Often, when the "Bottoms Up" driver printed out an invoice regarding a particular

sale, the discounts or allowances were not printed on the invoice. Taxpayer Ex. 4; Tr. pp. 70 ("Rogers"); 88-89 ("Yoyo").

25. On some of the "Bottoms Up" invoices admitted as hearing, discounts or allowances were hand written, either on the top page of the formset (so that the discount appeared as carbonless handwriting on taxpayer's yellow copy of the invoice) (*see, e.g.*, Taxpayer Ex. 4, pp. 15, 17, 21), or in original ink or pencil on taxpayer's copy of the invoice. *E.g.*, Taxpayer Ex. 4, pp. 4, 38.
26. Taxpayer introduced 103 invoices from "Bottoms Up". Taxpayer Ex. 4. The chart below identifies the number of cases purchased per invoice in the exhibit, as well as the dollar amount of the discounts that are handwritten on those invoices.

Page #	cases / handwritten discounts per invoice	Page #	cases / handwritten discounts per invoice	page #	cases / handwritten discounts per invoice	page #	cases / handwritten discounts per invoice
1	22	31	25	61	334	91	39 / 3
2	6	32	141	62	37	92	176
3	40	33	7	63	3	93	245
4	268 / 10	34	28 / 25	64	28	94	5
5	77	35	150	65	75 / 50	95	80 / 26
6	33	36	7	66	6	96	9
7	28	37	25	67	290	97	31
8	249	38	301 / 31	68	88	98	137
9	75	39	129	69	47 / 91	99	102
10	40	40	239	70	6 / 6	100	28
11	60	41	163 / 223	71	51	101	100
12	213	42	3	72	14	102	227
13	50	43	17	73	62	103	145
14	11	44	79	74	28		
15	180 / 100	45	24	75	17		
16	6	46	6	76	53		
17	105 / 150	47	40	77	3		
18	10	48	301	78	43		
19	76	49	51	79	3		
20	100	50	15	80	108		
21	67 / 88	51	4	81	233		
22	3	52	32 / 48	82	68		
23	165	53	195 / 145	83	125		
24	16	54	17	84	360 / 160		
25	10	55	159 / 391	85	18		
26	8	56	300 / 940	86	163		

27	25	57	177 / 25	87	91 / 37		
28	104	58	33	88	41		
29	58	59	123 / 74	89	44		
30	112 / 180	60	3	90	35		
<b>TOTALS</b>	<b>2217 / 528</b>		<b>2794 / 1902</b>		<b>2474 / 344</b>		<b>1324 / 29</b>

Taxpayer Ex. 4 (discount amounts rounded to the nearest whole dollar).

27. Based on the invoices that were introduced at hearing, "BOB's" purchased, on average, approximately 86 cases of beer per invoice. Taxpayer Ex. 4; *see also*, chart, *supra*, p. 7 ( $8809 \div 103 \approx 85.52$ ).
28. Taxpayer received regular deliveries from "Bottoms Up" approximately twice each week, in the morning. Taxpayer Ex. 4, *passim* (invoices bear time when sale/deliveries were made).
29. The three invoices which "Yoyo" identified as having received for the first time from "Bottoms Up" vice president showed that the purported sales/deliveries occurred at approximately 7 p.m., 4:15 p.m., and 3:30 p.m., respectively. Taxpayer Ex. 9. Those three invoices purported to be with regard to sales/purchases of 1,320, 550, and 529 cases of beer, respectively. *Id.*
30. The "Bottoms Up" driver/salesman servicing taxpayer was the same driver throughout the audit test year. *See* Tr. p. 60 ("Rogers").
31. "Bottoms Up" subsequently discharged that individual in 1996. *Id.*

**Facts Regarding "F & J" Records & Taxpayer's Records:**

32. For the 12-month test period, the auditor reviewed taxpayer's copies of invoices regarding purchases from "F & J Grocers" ("F & J"). Taxpayer Ex. 1; Tr. pp. 43-44 (Hoyt). After her review, she determined that taxpayer purchased approximately \$13,800 worth of goods from "F & J" for resale. Taxpayer Exs. 1-2; Tr. pp. 43-44 (Hoyt).



33. The auditor determined that "F & J" records indicated that it sold taxpayer approximately \$40,555 worth of goods for resale. Taxpayer Ex. 2.
34. At hearing, taxpayer introduced invoices and statements it kept and maintained regarding its purchases from "F & J". Taxpayer Ex. 5. Many of the invoices in that exhibit had not been taken into account by the auditor when completing schedules prepared during the audit. *Compare* Taxpayer Exs. 1 *with* 5.
35. The invoices and statements included in Taxpayer Exhibit 5 show that, during 1995, taxpayer made purchases and received credits from "F & J" in the following amounts on the following dates in 1995:

<b>Purchase (Credit) Date</b>	<b>Amount</b>
1/9/95	\$ 1,902
1/11/95	2,553
1/12/95	(62)
2/9/95	4,507
2/15/95	1,221
3/22/95	4,898
4/28/95	(38)
5/23/95	6,092
5/26/95	(385)
7/10/95	4,171
9/5/95	5,375
9/11/95	(12)
9/14/95	2,443
10/20/95	2,365
10/25/95	(8)
10/31/95	(7)
11/7/95	2,804
11/8/95	(42)
11/16/95	649
12/6/95	1,212
12/7/95	(134)
12/21/95	706
<b>Total Purchases</b>	<b>\$ 40,898</b>
<b>Total Credits</b>	<b>(688)</b>
<b>TOTAL PER BOOKS &amp; RECORDS AT HEARING</b>	<b>\$ 40,210</b>

Taxpayer Ex. 5.

**Facts Regarding Taxpayer's Newspaper Sales:**

36. The auditor disallowed a deduction taxpayer took on its returns regarding its sales of newspapers.
37. Taxpayer produced its invoices from the Chicago Sun-Times and from the Chicago Tribune during the Department's audit, and offered those invoices as evidence at hearing. Taxpayer Ex. 6.

**Conclusions of Law:**

The Department introduced its corrections of "BOB's" returns into evidence under the certificate of the Director. Department Group Ex. No. 1, pp. 1-3. The Department's correction of a taxpayer's returns constitutes *prima facie* proof of the correctness of the amount of tax due. 35 ILCS 120/4. The Department's *prima facie* case is a rebuttable presumption. Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 157, 242 N.E.2d 205, 207 (1968); DuPage Liquor Store, Inc. v. McKibbin, 383 Ill. 276, 279, 48 N.E.2d 926, 927 (1943). A taxpayer cannot overcome the presumption merely by denying the accuracy of the Department's assessment. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833, 527 N.E.2d 1048, 1053 (1st Dist. 1988). Instead, a taxpayer must present evidence that is consistent, probable and identified with its books and records to show that the assessment is not correct. Filichio v. Department of Revenue, 15 Ill. 2d 327, 333 (1958); A.R. Barnes & Co., 173 Ill. App. 3d at 833-34.

The issue in this matter involves alleged errors the Department made when calculating "BOB's" purchases for a test period, which purchases were then used to calculate taxable gross receipts for the audit period. *See* Tr. pp. 30-31, 44, 126-27 (Hoyt).

The errors allegedly occurred in three areas. First, taxpayer contends that the report the auditor received from "Bottoms Up" overstated the quantity of goods taxpayer purchased from that vendor. Taxpayer also contends that the auditor erred when she ignored the discounts reflected on the books and records taxpayer kept regarding its purchases from "Bottoms Up", and which taxpayer tendered for audit. Second, taxpayer claims that the auditor failed to take into account all of the purchases reflected on taxpayer's books and records regarding its purchases from "F & J". Finally, "BOB" asserts that it was entitled to the deductions it took on its returns for gross receipts from selling newspapers. That deduction was disallowed by the auditor, and tax was assessed on the gross receipts the Department estimated that taxpayer received from such sales. I will address each contention in turn.

### **Conclusions Regarding Taxpayer's Purchases From "Bottoms Up"**

Taxpayer's president, "Yoyo", testified that "BOB" did not receive the goods listed on three invoices from "Bottoms Up". Tr. pp. 83-91 ("Yoyo"). He said that he knew "BOB" neither purchased nor received those goods because: he never made a single purchase from one vendor in the amount of \$13,000; he never received any large deliveries from "Bottoms Up" in the afternoon or at night; and because his store couldn't fit 1300 cases of beer from one delivery. *Id.* The invoices taxpayer introduced at hearing directly corroborate "Yoyo"'s testimony on the first two points, and provide circumstantial support for "Yoyo"'s third contention. Of the 103 invoices offered at hearing as Taxpayer Exhibit 4, and which were admitted without objection, the largest number of cases purchased in any one invoice was 360. Taxpayer Ex. 4, p. 84. Moreover, the total number of cases purchased in all of the invoices was 8809, indicating

that taxpayer purchased, on average, 86 cases of beer per invoice. Taxpayer Ex. 4; *see supra*, chart, p. 7.

With regard to the specific invoices "Yoyo" testified he never received from "Bottoms Up" on or about the date they were written, those invoices purport to sell to "BOB" 1,320, 550, and 529 cases of beer, respectively. Taxpayer Ex. 9. Those invoices also reflect sales and delivery times that were much later than "BOB's" regular morning deliveries from "Bottoms Up". *Id.* (the three invoice reflect sale/delivery times of approximately 7 p.m., 4:15 p.m., and 3:30 p.m., respectively). Additionally, "Yoyo" testified that he first received those three invoices from "Bottoms Up" vice-president after he inquired of "Bottoms Up" management why "Bottoms Up" records showed that "BOB" purchased so many more goods than did taxpayer's records. Tr. pp. 80, 96-97 ("Yoyo"). "Rogers", "Bottoms Up" sales manager, corroborated "Yoyo"'s testimony that "Yoyo" received those invoices from him and "Bottoms Up" vice-president. Tr. p. 68 ("Rogers"). He also testified that the "Bottoms Up" driver who prepared the invoices pursuant to which "Bottoms Up" purported to sell taxpayer thousands of dollars worth of goods — goods that taxpayer subsequently contended it never received or paid for — was fired by "Bottoms Up" sometime in 1996. Tr. p. 60 ("Rogers").

One of the bases for the auditor's projection of a level of unreported receipts was that "BOB", in fact, purchased all the goods "Bottoms Up" reported to the Department that it had sold to "BOB". "BOB" rebutted that factual proposition through the credible testimony of persons with personal knowledge of "BOB's" transactions with "Bottoms Up", and that testimony was closely identified and consistent with "BOB's" regularly maintained books and records. *See* Taxpayer Ex. 4, *passim*. I conclude, therefore, that

taxpayer rebutted the *prima facie* correctness of the Department's determination that "BOB" purchased all of the goods "Bottoms Up" purported to have sold to it. More specifically, I conclude that taxpayer has introduced evidence to show that it did not purchase the goods described in Taxpayer Ex. 9.

As to the second part of "BOB's" alleged errors involving its "Bottoms Up" purchases, "Rogers" also corroborated "Yoyo's" testimony that the hand-written discounts included on "BOB's" invoices were, in fact, authorized by "Bottoms Up", regardless whether those discounts may have been printed or hand-written on taxpayer's invoices. Tr. p. 57 ("Rogers", testifying that it was "standard procedure" for "Bottoms Up" drivers to allow discounts even when they weren't printed on the original invoice formset). "Rogers" confirmed that "Bottoms Up" gave volume purchasers like "BOB" discounts, and that those discounts were ordinarily given for the year. Tr. p. 55 ("Rogers"). "Rogers" testified that the reason the discounts may have been hand written on the invoices is because the discounts were, for whatever reason, not printed on the invoices prepared by "Bottoms Up's" driver-seller. Tr. pp. 70-71 ("Rogers").

The testimony of both "Rogers" and "Yoyo" is supported by what clearly appears to be "Yoyo's" handwritten entries on the "Bottoms Up" invoices offered as evidence. Those invoices bear handwritten check numbers and, occasionally, the amounts of the checks written regarding the particular invoice. *See, e.g.*, Taxpayer Ex. 4, pp. 4, 15, 38, 84. Similar entries also appear on invoices from vendors other than "Bottoms Up". *Compare* Taxpayer Ex. 4 *with* Taxpayer Ex. 5 (invoices and statements from "F & J"). Where the amount of the checks are included on the invoices admitted as evidence, the amount took into account the discounts, even those discounts that were hand-written on

original ink on taxpayer's copies of the invoices. *See, e.g.*, Taxpayer Ex. 4, pp. 4, 15, 38, 84. In other words, the books and records offered as evidence show that taxpayer's cost price for the goods purchased from "Bottoms Up" took into account the discounts that were hand-written on the invoices. The Department should have taken them into account, also.

The parties agreed that the auditor did not include any discounts or allowances that were handwritten on the invoices taxpayer produced for audit. I conclude, therefore, that taxpayer also rebutted the *prima facie* correctness of the Department's estimate of what "BOB" paid for the goods it purchased from "Bottoms Up". The invoices "BOB" introduced at hearing constitute more credible and reliable evidence of the actual cost price of the goods taxpayer purchased from "Bottoms Up" than the auditor's estimate of what "Bottoms Up" might have received for the goods taxpayer purchased. That estimate used incomplete information from "Bottoms Up", and ignored consistent and credible information disclosed by taxpayer's books and records, which were tendered for audit and offered as evidence at hearing.

After "BOB" rebutted the *prima facie* correctness of the Department's determinations, the burden shifted back to the Department to establish, with competent evidence, the facts at issue. *See Novicki v. Department of Finance*, 373 Ill. 342, 345-46 (1940). The Department offered no competent evidence sufficient to establish such facts.

Based on the conclusions just described, I recommend that certain changes be made regarding the entries on the auditor's schedule 7A-1, which was offered as Taxpayer Exhibit 2. First, the cost of the goods as reflected on the invoices included in Taxpayer Exhibit 9 should be subtracted from taxpayer's "Purchases per EDA20s" from

"Bottoms Up". *See* Taxpayer Ex. 2. That is, the entry for taxpayer's "Purchases per EDA20s" from "Bottoms Up" should be changed from \$192,466 to \$168,119. *See* Taxpayer Exs. 2, 9 ( $\$192,466 - (13,262 + 5,521 + 5,564) = \$168,119$ ).

Second, and when considering the invoices admitted as Taxpayer Ex. 4, I noted the amount of the discounts handwritten on the particular invoices on which such discounts were entered. *See* chart, *supra*, p. 7. Those discounts total \$2803. Therefore, the credit entered on Schedule 7A-1 (Taxpayer Ex. 2), for "BOB's" purchases from "Bottoms Up", should be changed from \$18,891 to \$21,694. *See* Taxpayer Ex. 2 ( $18,891 + 2803 = 21,694$ ).

Since "BOB's" "Purchases per EDA20s" should be changed from \$192,466 to \$168,119, and the credits properly attributable to such purchases should be changed from \$18,891 to \$21,694, the entries for taxpayer's "Net Purchases" and "Difference [between vendor's records and taxpayer's records]" must also be corrected on Schedule 7A-1. *See* Taxpayer Ex. 2. "BOB's" "Net Purchases" should be changed from \$173,575 to \$146,425. Taxpayer Ex. 2 ("Net Purchases" = "Purchases per EDA20s" - "[ ] credits", or  $168,119 - 21,694 = 146,425$ ). Finally, the "Difference" between "Bottoms Up's" purchase records and taxpayer's records should be changed from - \$41,899 to - \$14,750. Taxpayer Ex. 2 ("Difference" = "Net Purchases" - "Purchases per Taxpayer", or  $146,425 - 131,675 = 14,750$ ). The NTL's should be revised after taking into account those changes.

### **Conclusions Regarding Taxpayer's Purchases From "F & J"**

The parties disputed the nature and content of the books and records taxpayer tendered for inspection during audit regarding its purchases from "F & J". The

Department auditor testified that she didn't see any invoices taxpayer kept from "F & J" for the period following May 1995. Tr. pp. 117-18, 124-25 (Hoyt). "Yoyo" testified that he gave all of the invoices he had to the auditor, and that the invoices he gave to the auditor were the ones he identified as Taxpayer Ex. 5, which were admitted as evidence at hearing. Tr. pp. 90-92 ("Yoyo"). The auditor testified that she "would have no way of knowing" whether the documents in Taxpayer Ex. 5 were the same ones she received during audit. Tr. p. 42 (Hoyt).<sup>1</sup>

Regardless what records were offered during audit, the auditor's schedule titled, "1995 Test of Purchases" was used as the basis for projecting a percentage of unreported

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<sup>1</sup> During rebuttal, the auditor testified that she issued a 60-day demand for documentation to taxpayer, after which it "did not tender any additional invoices from "F & J"." Tr. p. 124 (Hoyt). Immediately thereafter, however, she was asked the following questions and gave the following answers:

Q: So if he's trying to withhold records because he wants to match his federal return, why does he withhold "F & J" records?

A: I have no idea.

Q: But you're sure that's what he did?

A: I have no — all I know is that I did not see any invoices from "F & J" after May of 1995.

\* \* \*

Q: Did the [60-day] letter say, "I want invoices from "F & J" from June of 1995 to December?"

A: The letter states all documentation required to complete the audit of the above company.

Q: But if he had already given you the documents [i.e., all of the "F & J" invoices and statements], he wouldn't be retendering them, would he?

A: Why would he retender them now? I have no idea to that question.

Tr. pp. 124-26 (Hoyt). One way to reconcile the conflicting testimony is to accept the possibility that, because of the volume of records taxpayer tendered, some of the "F & J" documents might simply have been overlooked. Moreover, many of the purchases reflected in Taxpayer Ex. 5, *see* Chart, *supra*, p. 7, did not come from invoices, but from statements of account issued to taxpayer from "F & J", which statements identified specific invoice numbers, dates, and amounts.

Therefore, and even if the Department had objected to the offer of Taxpayer Ex. 5 by offering proof that the 60-day demand was validly served (e.g., by offering the signed certified postal receipt, or a signed certificate of personal service, *see* 35 ILCS 120/7) — which it did not — this record does not contain the facts necessary to conclude that "BOB" did not tender, during audit, the documents it subsequently offered at hearing as its exhibit number 5.



sales throughout the audit period, and that schedule did not take into account all of the purchases reflected on the books and records taxpayer introduced at hearing. *See* Taxpayer Exs. 2, 5. Taxpayer's fundamental burden was to support, with books and records, its claim that the Department's determination of tax due was wrong (*see* Filichio v. Department of Revenue, 15 Ill. 2d at 333; A.R. Barnes & Co., 173 Ill. App. 3d at 833-34), and taxpayer introduced books and records sufficient to show that the Department assessed tax based on a formula that failed to take into account taxpayer's books and records. I conclude, therefore, that taxpayer has rebutted the *prima facie* correctness of the Department's determinations regarding taxpayer's purchases from "F & J".

After "BOB" rebutted the *prima facie* correctness of the Department's determination regarding taxpayer's purchases from "F & J", the Department offered the testimony of its auditor. She testified that if taxpayer purchased all of the goods it now contends it purchased from "F & J", such purchases would have been inconsistent with the purchases taxpayer reported on its federal income tax return. Tr. p. 118 (Hoyt). Specifically, the auditor testified that "It would have ... made his purchases per his federal income tax return incorrect because the total that I have matched the federal return. Now you're giving me more purchases, so now you're saying your federal return is incorrect." Tr. p. 118 (Hoyt).

The auditor's rebuttal seems to suggest that the total cost price of all of the invoices taxpayer kept, maintained and tendered for audit equaled the total amount of purchases as reported on taxpayer's federal return. That suggestion, however, is inconsistent with what the auditor did when conducting this audit. The auditor had "F & J's" records years ago, and she preferred them to the records taxpayer kept and produced

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for audit. In this specific instance, that means that even though taxpayer's books and records (i.e., the ones the auditor saw) showed only \$13,000 worth of invoices, the auditor determined that taxpayer really purchased more than \$40,000 worth of goods from "F & J". Based on the determinations made in this audit (and without having taxpayer's federal return in evidence) it seems more likely that what matched taxpayer's federal return were whatever documents showed the greatest number of purchases by taxpayer, be they taxpayer's records or its vendors' records. *See* Taxpayer Ex. 2. After considering the Department's rebuttal evidence, I conclude that the Department offered no clear evidence to show that the entry on Schedule 7A-1, titled, "Difference [between "F & J's" "Net Purchases" and "Purchases per Taxpayer"]" was accurately calculated.

The invoices and statements admitted at hearing show that taxpayer purchased \$40,210 worth of goods from "F & J" for resale. Taxpayer Ex. 5; *see* chart, *supra*, p. 9. When counting taxpayer's invoices from "F & J", the auditor scheduled only \$13,831 worth of purchases; and she subtracted that number from "F & J's" records (which showed that it sold \$40,555 worth of goods to taxpayer), for a difference of approximately -\$26,724. The difference should be corrected to show -\$345. Taxpayer Ex. 2.

### **Conclusions Regarding the Department's Disallowance of Taxpayer's Deductions for Newspaper Sales**

On the returns it filed during the audit period, taxpayer regularly took a deduction from its taxable gross receipts for the amount of receipts its realized from selling newspapers. *See* Tr. pp. 47-49 (Hoyt). The Department disallowed those deductions taxpayer took, and assessed tax on "BOB's" sales of newspapers by including taxpayer's purchases of newspapers with the other purchases regarding which the auditor multiplied

a mark-up to calculate the preferred measure of "BOB's" taxable gross receipts. Tr. p. 48 (Hoyt); *see also* Taxpayer Ex. 1. At hearing, taxpayer introduced the invoices showing its purchases of newspapers for the 1995 test period. Taxpayer Ex. 6.

Taxpayer has rebutted the Department's *prima facie* case on this last issue also. As a matter of law, gross receipts from the sale of newspapers are not subject to retailers' occupation tax. 35 ILCS 120/1; Time, Inc. v. Hulman, 32 Ill. 3d 344, 201 N.E.2d 374 (1964). Taxpayer established, with books and records, that it purchased newspapers for resale, and it regularly deducted the gross receipts it received from making such sales on the returns it filed. It has supported its claim that such receipts are not subject to tax, and that it was entitled to deductions taken. The Department, thereafter, offered no evidence to suggest that taxpayer charged or collected tax regarding such sales, or that the deductions taken did not accurately reflect the amount of gross receipts taxpayer actually received from selling newspapers.

**Conclusion:**

I recommend that the NTL's and the corrections of taxpayer's returns be revised to take into account the changes detailed in this recommendation. The NTL's should be finalized as revised.

Date: 6/9/99

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Administrative Law Judge